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1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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5 In the Matter of

6 Case No.  
7 05-60200

8 CALPINE CORPORATION, et al.,

9 Debtors.

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11 June 21, 2006  
12 United States Custom House  
13 One Bowling Green  
14 New York, New York 10004

15 Hearing Pursuant to Agenda of Matters.

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18 B E F O R E:

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20 HON. BURTON R. LIFLAND,  
21 U.S. Bankruptcy Judge

4

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2 A P P E A R A N C E S (Continued)

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6 Law Debenture  
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19 couple of the matters on the agenda this morning.  
20 Your Honor, the first matter on, and  
21 we'll go through the uncontested matters first. We  
22 have a couple of motions. The first one is number  
23 one on the agenda, it's an omnibus motion for an  
24 order authorizing the debtor to assume some non  
25 residential real property leases and settling cure

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1 amounts related to that. The first motion in the  
2 binder, it's a motion to assume some pipeline  
3 leases.  
4  
5 CPN Pipeline is a natural gas  
6 transportation and gas gathering business that the  
7 company is in, and basically they used that debtor  
8 to supply gas to the projects and to produce power.

9 A number of the leases relating to those pipe  
10 lines, we believe, are leases of non residential  
11 real property. There a there's a deadline coming  
12 up for the assumption or rejection of those types  
13 of leases. As set forth in our motion, it's the  
14 debtors' business judgment that they are necessary  
15 and appropriate for the operation of the business,  
16 have real value to us, and under Section 365(d)(4)  
17 or 365 of the Bankruptcy Code, we should be  
18 authorized to assume those leases.

19 Your Honor, notice of the motion was  
20 served on the official committee, the ad hoc  
21 committee, and the 2002 list, and we received no  
22 objections.

23 THE COURT: Does anyone want to be

24 heard?  
25 Your application is granted. Submit

7

1 CALPINE CORPORATION  
2 an appropriate order.

3 MR. CANTOR: Should I just bring the  
4 orders up?

5 THE COURT: I'll entertain them.

6 MR. CANTOR: Thank you.

7 THE COURT: You can bring it to me  
8 now or get it into the hopper.

9 I've approved the order.

10 MR. CANTOR: Thank you, your Honor.  
11 The next motion is also --

12 THE COURT: What's your date for  
13 assumption or rejection?

14 MR. CANTOR: I believe the date is  
15 July 18th. Is that the date for the deadline?

16 THE COURT: This is a large case, I  
17 would assume you have a handle on all these  
18 executory contracts.

19 MR. CANTOR: I'm sorry, your Honor?

20 THE COURT: In this large case, I  
21 would assume that you have a handle on all of these  
22 executory contracts so that you can make an  
23 informed judgment of the deadline date.

24 MR. CANTOR: And, your Honor, with  
25 most if not all the leases we will. There is one

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group of leases that we may see you on relating to the Rosetta transaction. I know we were trying to collect information relating to get an ability to understand whether it should be assumed or rejected. I don't believe the issue has risen to the level of need to see you about it, but we are on top of this, your Honor.

Your Honor, the next motion is a motion for approval of an agreement. It's a license agreement with SunGard. It's number 2 on the agenda; it's entitled motion for an order pursuant to Sections 363, 365 and 6004 authorizing debtors to enter into an amended agreement and assume and assign the amended agreement. Your Honor, this is an agreement -- we had a dispute with SunGard, the licensor of the Nucleus software, it's a software we use in our energy management services.

We needed more licenses. We needed more people to be able use the software, and there were a number of disputes relating to how much that should cost, there were some issues about when the software would expire. There was also a need on our part to assume the license and assign it to one

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of the debtors' subsidiaries that currently is not a licensee, we call it CMSC.  
After extensive negotiations, the company was able to come to an understanding with

SunGard on the new license agreement. The terms and conditions of it are set forth in the motion. It effectively requires us to pay one million 350 thousand dollars, it gives us the ability to assign a contract to CMSC if and when we need to, it provides for a mutual release of the disputes, and it affirms our ability to use the software, to the extent there was any question of for that.

Likewise, your Honor, this motion was served on the official committee and the ad hoc committee and the 2002 list, and we received no objections.

THE COURT: Does anyone want to be heard?

The application is approved.

MR. CANTOR: May I approach?

THE COURT: Yes.

I've approved the order.

MR. CANTOR: Thank you, your Honor.

The next motion is our application

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to retain Sirius Solutions LLP. These are consultants who provide services related to the company's internal controls relating to the accounting function. It's a requirement of Sarbanes-Oxley regulations that we develop certain very particular protocols and review and documentation of the company's internal controls; services that the company and the board think are absolutely necessary to conform with the

11 requirements of Sarbanes-Oxley and have the  
12 appropriate internal accounting controls in place.  
13 Your Honor, we've also asked Sirius  
14 Solutions to do some work relating to the  
15 evaluation of a settlement statement relating to  
16 the Rosetta sale; that was a sale of some natural  
17 gas resource assets the company sold before the  
18 commencement of the case. The settlement  
19 statement, the final closing statement relating to  
20 that transaction has not been finalized, and Sirius  
21 has been providing services, and we would like to  
22 them to continue to provide services as it relates  
23 to that.

24 Your Honor, you'll see, as set forth  
25 in the application, that Sirius did have

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1 CALPINE CORPORATION  
2 prepetition amounts owed on account of prepetition  
3 services of approximately 217 thousand dollars.  
4 Those claims are being waived. Your Honor, there's  
5 also been work done after the commencement of the  
6 case but prior to this application. The amounts  
7 are set forth in the application, and we would  
8 request that the application be approved nunc pro  
9 tunc, subject, of course, to Sirius providing, in  
10 their first fee application, support for the work  
11 they have done after the commencement of the case.

12 Your Honor, these are services that  
13 we think are necessary to enable us to manage the  
14 enterprise in accordance with Sarbanes-Oxley. It's  
15 a highly complicated business from an accounting

16 perspective to begin with, and in order to have the  
17 appropriate internal controls so that we can  
18 continue to comply with our public reporting  
19 obligations, we think this is necessary and  
20 appropriate. Likewise, the application has been  
21 served to the committees and the 2002 list, and  
22 we've received no objections.

23 THE COURT: Does anyone want to be  
24 heard?

25 The application is granted.

12

1 CALPINE CORPORATION  
2 MR. CANTOR: Thank you.  
3 THE COURT: I've approved the order.  
4 MR. CANTOR: Thank you, your Honor.  
5 The next application is the creditor  
6 committee's application, and Mr. Stamer will be  
7 taking care of that.

8 MR. STAMER: Good morning, your  
9 Honor. Michael Stamer from Akin Gump Strauss Hauer  
10 and Feld on behalf of the official committee.

11 Your Honor, number 4 is the agenda  
12 is the committee's application pursuant to Sections  
13 105(a), 1102(b) (3) and 1103(c) for authority to  
14 retain the Garden City Group, Inc. as  
15 communications agent nunc pro tunc to February  
16 16th.

17 Your Honor, pursuant to the  
18 affidavit of service of Bradley Roe of our firm,  
19 docket number 1834. On June 8, 2006 a copy of the  
20 application was served by regular mail and

21 electronic mail on the parties identified on the  
22 annexes to the affidavit. In addition, on June 8th  
23 the application was filed electronically on ECF,  
24 and therefore all ECF participants received a copy  
25 of the application.

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2 In addition, your Honor, in advance  
3 of the filing of the application, the committee  
4 spent a significant amount of time with both the US  
5 Trustee's office and with the debtors to address  
6 any concerns either of those parties had. I'm  
7 happy to report that the objection deadline was  
8 June 19th and no objections were filed.

9 Your Honor, as you'll recall, just  
10 very briefly, pursuant to a stipulation and order  
11 between the debtors and committee approved by this  
12 court on February 23rd, the committee was required  
13 to, among other things, establish a website to  
14 satisfy its information sharing obligations under  
15 new Section 1102(b)(3) of the Bankruptcy Code.

16 Your Honor, pursuant to application,  
17 the committee seeks to retain Garden City as its  
18 communication agent to allow the committee to  
19 comply with its obligations under 1102(b)(3) and  
20 the stipulation and order approved by this court.  
21 Garden City will be compensated in accordance with  
22 Schedule A attached to their retention agreement.

23 The committee selected Garden City  
24 after a competitive interview process. The  
25 committee believes that in fact the compensation

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2 that Garden City is requesting is fair and  
3 reasonable and market under the circumstances for  
4 the services to be provided.

5 In addition, your Honor, in our  
6 discussions with the debtors, which resulted in no  
7 objection being filed, we addressed a number of the  
8 concerns that the debtors expressed relating to  
9 possible duplications of efforts with their  
10 information agent with respect to ours. We have  
11 actually agreed upon some language, if I may just  
12 briefly read it into the record, which I believe  
13 addresses the concerns: "In connection with the  
14 committee's information sharing website, we do not  
15 intend (the committee) to duplicate the information  
16 provided on the debtors' website. To the extent  
17 that the debtors' website posts information  
18 prepared by the debtors that should be shared with  
19 unsecured creditors, such as Calpine's press  
20 releases, SEC filings, docket reports, pleadings  
21 and the like the, committee's website will provide  
22 link to the debtors' website for such information.

23 "With regard to information prepared  
24 by the debtors such as financial summaries, to the  
25 extent the committee's professionals believe that

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2 such information should be included on the  
3 committee's website, we will use the debtors'  
4 summary, subject to the committee's professional  
5 review of such information, and in the event such  
6 information is determined to be accurate and  
7 available without delay, the committee will use the  
8 debtors' work product on the committee's website.  
9 However, to the extent the committee's  
10 professionals determine that any information  
11 requires input from the committee's professionals,  
12 or is otherwise required to be posted on the  
13 committee's website pursuant to information sharing  
14 order, such as summaries of pending motions,  
15 hearing updates, answers to frequently asked  
16 questions or information regarding other pertinent  
17 events in the debtor; Chapter 11 cases, the  
18 committee's professionals will prepare their own  
19 documents to be shared on the website."

20 Your Honor, I believe the purpose of  
21 that language and the interaction we've had with  
22 the debtors is to make sure that to the extent  
23 there is work product that has been done, that we  
24 are not reinventing the wheel, that in fact we  
25 comply with our obligation, both under the statute

1 CALPINE CORPORATION  
2 and the order, to give our creditors non  
3 confidential information as efficiently and  
4 effectively as possible.  
5 Again, your Honor, no objections  
6 were filed, and the committee believes that the

16

7 retention of Garden City is the most efficient and  
8 effective way to satisfy its obligations under the  
9 Bankruptcy Code.

10 MR. CANTOR: Your Honor, no  
11 objection from the estate in retaining Garden City.  
12 We did see the application and the request. We had  
13 some concerns that we did our level best to ensure  
14 that whatever work product that was already  
15 produced or that would be produced by the debtors,  
16 would not be recreated and that we were able to  
17 come up with the appropriate links.

18 THE COURT: Why don't you two  
19 educate me? How many information agents are  
20 working on the turf? When one looks at the court's  
21 website, you are immediately referred to the work  
22 product of an information agent. I don't know if  
23 that's the debtors' or one of the court's retained,  
24 and I don't know where the linkage takes place.

25 MR. CANTOR: Your Honor, the estate

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2 is --

3 THE COURT: And I'm from Mars and I  
4 want to find something out about this case. The  
5 logical thing would be to go to the court's  
6 website. Where does the linkage go from there and  
7 how many information agents are involved?

8 MR. CANTOR: Your Honor, the debtors  
9 one information agent, Kurtzman Carson Consultants.  
10 They provide the noticing services, they also  
11 maintain a website which provides basically a link

12 to any entry on the docket.  
13  
14 THE COURT: Is that the link that  
15 you see when you get into the court's website?  
16 Every mega case in this court has an information  
17 agent that most people get to see for almost all  
18 the information in the case.  
19 MR. CANTOR: Your Honor, this is  
20 David Seligman, he's with Kirkland and Ellis, and  
21 he may be the best person to answer the technical  
22 questions.  
23 MR. SELIGMAN: Good morning, your  
24 Honor.

25 THE COURT: All I had asked was how  
many information agents were running around.

18

1 CALPINE CORPORATION  
2 MR. CANTOR: I knew how many, your  
3 Honor.  
4 MR. SELIGMAN: David Seligman of  
5 Kirkland and Ellis on behalf of the debtors. Your  
6 Honor, I don't know the full details, but  
7 essentially when a creditor wishes to know about  
8 this case, there are a variety of ways that they  
9 can find out about this case; one is to go to the  
10 court's website and they can review the docket and  
11 other pertinent information. There is, I believe,  
12 a link on the court's website to the debtors'  
13 private information agent.  
14 THE COURT: That's what I assume.  
15 MR. SELIGMAN: That's correct. We  
16 also in our of all pleadings refer to the court's

17 website as well as to the debtors' private website  
18 where they can go.  
19 The issue here is, because of the  
20 creditors committee's own obligations to its  
21 constituents, it needs its own website, and we have  
22 worked hard with the committee to make sure that  
23 there is no duplication and that there is cross  
24 references between the two.

25 THE COURT: So you don't get to the

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1 CALPINE CORPORATION  
2 committee's website unless you link from the  
3 court's to the committee's.

4 The committee's is not on the  
5 court's website; is that correct?

6 MR. STAMER: The committee's website  
7 hasn't been set up yet, your Honor. We've done a  
8 tremendous amount of work, and it should be days  
9 after this application is approved. But my  
10 assumption is there will be cross references  
11 linking in a number of different directions.

12 The reason we thought it was  
13 important to have a separate committee information  
14 agent was to avoid confusion. There are disclosure  
15 obligations that the debtor has; there are now new,  
16 and to some degree untested disclosure obligations  
17 that the committee has. The purpose of hiring the  
18 information agent is so we had can handle that,  
19 have an expert in the field, as opposed to doing it  
20 in house in the law firm. And the dialogue we had  
21 with the U.S. Trustee and with the debtors is to



22 make sure it followed the precedents in this  
23 jurisdiction, for example, Music Land basically did  
24 it the same way. And the conversation we had with  
25 the debtors dealt with the need to avoid

20

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2 duplication of effort, which I think we've  
3 satisfied the debtors, and hopefully we have  
4 satisfied the court as well.

5 THE COURT: Is it your intention to  
6 post this website on the court's website?

7 MR. STAMER: I believe so. It would  
8 make sense, so individual creditors who wanted to  
9 hear or see what was posted on the committee's  
10 website would have the option to do that.

11 THE COURT: All right. Does anybody  
12 else want to be heard?

13 The application is granted.

14 MR. STAMER: Your Honor, I have an  
15 order. If I may approach?

16 THE COURT: I'll entertain it.

17 MR. STAMER: Thank you.

18 THE COURT: I've approved the order.

19 MR. CANTOR: Your Honor, the next  
20 item on the agenda, number 5, which is listed as  
21 contested has since become uncontested. And Jeff  
22 Powell, my colleague, will take care of that  
23 motion.

24 MR. POWELL: Good morning, your  
25 Honor. Jeff Powell for the debtors. When our

21

1 CALPINE CORPORATION  
2 motion to assume was filed, we identify 35 leases  
3 that were the subject of the motion. 14 have been  
4 withdrawn by agreement, and we set that out in our  
5 reply brief. There was no objection to 16 leases,  
6 leaving only five leases at issue. The Wilmington  
7 Trust and HSBC filed an objection with respect to  
8 those five leases.

9 In the last 15 minutes, I believe  
10 there's been a resolution as to those five leases.  
11 And to skip a step, Mr. Solum will recount them.

12 THE COURT: Sure.

13 MR. SOLUM: Good morning, your  
14 Honor. With respect to the five leases that are at  
15 issue, for all but two of the leases and those two  
16 leases relating to Columbia, the HSBC and  
17 Wilmington creditors are withdrawing their  
18 objections.

19 With respect to those two leases  
20 related to Columbia, we are going to adjourn the  
21 motion to assume for three weeks until our next  
22 hearing date -- rather two hearing dates from now,  
23 until mid July. During that time, both Wilmington  
24 and HSBC have agreed not to seek any further  
25 discovery or serve any further discovery, whether

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1 CALPINE CORPORATION  
2 in connection with the motion, through 2004, or  
3 otherwise. And also during that time we are going

4 to see if we can get an extension pursuant to  
5 365(d) (4) beyond July 18th. And then we are also  
6 going to sit down with Wilmington and potentially  
7 HSBC, including their clients, to discuss some  
8 outstanding information requests regarding  
9 presumably historical financial information.  
10 I would invite either HSBC or  
11 Wilmington to weigh in here in case I've misstated  
12 the settlement that we've reached.

13 MR. POWELL: Your Honor, those are  
14 leases 11 and 12 on the chart that we submitted to  
15 your Honor.

16 MR. MILLIO: Your Honor, Victor  
17 Millio(ph) of Dicks and Pividy(ph) representing  
18 Wilmington Trust.

19 The stipulation is accurately as  
20 stated, and we are withdrawing our objection as to  
21 number 15, number 27, and number 18, but preserving  
22 our objection in our and our rights to argue it in  
23 three weeks, assuming we are not able to resolve  
24 it, on numbers 11 and 12.

25 THE COURT: Pursuant to those

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2 statements, those objections are marked withdrawn.

3 MR. PIVIDY: Thank you, your Honor.

4 THE COURT: And the balance  
5 preserved.

6 MR. SOMERSTEIN: Good morning, your  
7 Honor. Mark Somerstein of Ropes and Gray for HSBC.  
8 Your Honor, just to clarify the

9 record in one small way: Technically HSBC didn't  
10 object to the motion, but we did want to make the  
11 court aware of the concerns that we share with  
12 Wilmington regarding information and request and  
13 information flow. We are pleased to have the  
14 opportunity during this three weeks period to meet  
15 with the company, discuss some of our issues with  
16 respect to the CalGen plants, and we certainly look  
17 forward to that, and hopefully we will not need to  
18 pursue this matter with the court.

19 THE COURT: Very good.

20 MR. SOMERSTEIN: Thank you.

21 MR. SOLUM: Your Honor, with respect  
22 to the order, we're just to need a couple of  
23 minutes so we can amend it to incorporate the  
24 settlement we just reached.

25 THE COURT: Submit the order.

24

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2 MR. SOLUM: Thank you, your Honor.

3 MR. MILLIO: Thank you, your Honor.

4 MR. CANTOR: Your Honor, the next

5 item is number 6 on the agenda, it's our motion for  
6 an order amending and modifying the cash collateral  
7 order in this case. And in particular, your Honor,  
8 we are seeking an order of the court modifying the  
9 cash collateral order, to the extent -- as part of  
10 the adequate protection package offered to the  
11 holders of the first lien secured debt the debtors  
12 had committed to reimburse them.

13 So I'll let Mr. Ryan get up here.

14 MR. RYAN: Thank you.  
15 MR. LEVINE: Thank you, your Honor.  
16 MR. CANTOR: Your Honor, to the  
17 extent that we had agreed at the outset of the case  
18 that in exchange for the entry of an order  
19 authorizing us to use cash collateral, including  
20 the first lien holder's cash collateral and  
21 providing other adequate protection, the estate  
22 agreed, among other things, to reimburse them on a  
23 current basis for the professional fees and  
24 expenses incurred by them.

25 Your Honor, as you know, things have

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2 changed. Since your Honor entered the order  
3 authorizing us to repay the first lien holders, we  
4 have in fact paid them the principle and interest  
5 due. As you know, and as set forth in our papers  
6 and theirs, there is some dispute as to whether or  
7 not there is an entitlement to a make whole  
8 premium, and that issue is the subject of an  
9 adversary proceeding before your Honor, and we have  
10 a status conference on that following the hearing  
11 on this motion.

12 Your Honor, it's set forth pretty  
13 clearly in our application that from our  
14 perspective in the outset we don't believe that  
15 there's any entitlement to adequate protection,  
16 that the make whole obligation is not valid, and  
17 that there is no secured claim. And to the extent  
18 that there's a obligation under Section 506(b) of

19 the Bankruptcy Code or an entitlement to a claim  
20 for postpetition fees and expenses incurred on  
21 behalf of the secured creditors there, it's more  
22 appropriate to be determine in connection with a  
23 hearing on that claim and pay it at the end of the  
24 case or at some later time, but not appropriate to  
25 be part of an adequate protection package offered

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2 by us.  
3 Your Honor, to the extent that there  
4 is some determination or unwillingness to determine  
5 that there is no secured claim, we believe that  
6 based upon what are uncontested facts in this case,  
7 that in view of the tremendous amount of collateral  
8 currently securing what is a one hundred million  
9 dollar contested claim for a make whole payment, we  
10 believe, and I don't think there is any contest to  
11 that, that there is hundreds of millions if not  
12 billions of dollars of collateral securing that  
13 claim leaving the first lien holders, I think, at  
14 no risk of any material diminution in value of  
15 their collateral that would put their contested  
16 secured claim at risk.

17 You've heard at the prior hearing,  
18 your Honor, that the fees and expenses incurred by  
19 the first lien trustee have been material, and we  
20 have no doubt that there would be ensuing  
21 litigation and many other matters that are going to  
22 come before your Honor in the case over the next  
23 number of months, so these could be substantial

24 amounts of fees and expenses.

25 So based upon that, and you can

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2 obviously hear from the first lien holders as to  
3 their objection, we believe it's entirely  
4 appropriate, based upon the facts and  
5 circumstances, to amend and modify the original  
6 cash collateral order.

7 As we set forth in our papers,  
8 putting aside what your Honor has reminded us since  
9 the first day hearings, that your Honor retains the  
10 right to modify prior orders the of the court based  
11 upon new facts and circumstances, or as equity may  
12 require, but the cash collateral order itself was  
13 crystal clear that we reserve the right to come  
14 back to court. As we set forth in our papers, of  
15 course, we are reserving all of our other rights,  
16 and I don't suggest that we are waiving any rights,  
17 including the right to ultimately attack or  
18 challenge the first lien holders liens, challenge  
19 the reasonableness of any fees, and certainly we  
20 obviously are going to challenge the allowability  
21 of the make whole claim. So this is really a  
22 motion as it relates to the modification of the  
23 cash collateral order only.

24 And the last issues is we do request  
25 that the order be entered nunc pro tunc to the date

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2 that we repaid the first lien holder's claims for  
3 principal and interest. You should know that in  
4 the course of paying any fees and expenses in this  
5 case, statements are rendered to other parties in  
6 the case, and we received statements from the first  
7 lien trustee's attorneys for the fees incurred  
8 during those months with a very broad objection and  
9 reservation of rights. The estate did not pay  
10 those fees, and we did notify the first lien  
11 trustee that we were objecting to those fees and  
12 expenses incurred. I think it began right after we  
13 paid down their claims for principal and interest.  
14 And we have not resolved those objections.

15 So, your Honor, I think, based upon  
16 what I believe are uncontested facts, we should be  
17 authorized or your Honor should entertain an order  
18 modifying the cash collateral order that had been  
19 entered in this case.

20 MR. STAMER: Your Honor, may I be  
21 heard briefly? Again, for the record Michael  
22 Stamer from Akin Gump on behalf of the committee.  
23 Your Honor, on Friday of last week,  
24 the committee filed a statement in support of the  
25 debtors' motion. The committee does in fact

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2 support the debtors' motion to modify the cash  
3 collateral order. The committee's position is  
4 simple, and that is that we believe the first lien

5 holders have been paid in full. They have been  
6 paid in full principal interest and attorney's  
7 fees, to the extent they were entitled to it. The  
8 committee does not believe that they are entitled  
9 to any additional claim, that they are not entitled  
10 to any make whole, or for that matter any  
11 additional professional fees. We believe that the  
12 first lien holders are no longer secured creditors  
13 entitled to adequate protection. However, your  
14 Honor, if in fact the first lien holders are  
15 correct in all of their assertion, that they are  
16 secured creditors, that they are entitled to a make  
17 whole, that they are entitled to an allowed claim  
18 for professional fees under Section 506(b),  
19 assuming that they are correct on those, which we  
20 do not believe they are, the debtors' motion should  
21 still be granted. This is a situation, as Mr.  
22 Cantor described, where have you a disputed claim,  
23 no one disputes, in excess of one hundred million  
24 dollars, which is secured by collateral. They have  
25 retained their liens, to the extent they ever had

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2 them, in the amount that -- the collateral securing  
3 it is in the billions of dollars. So a one hundred  
4 million dollar claim secured by billions of  
5 collateral. The enormous equity cushion is more  
6 than sufficient adequate protection to protect the  
7 first lien holders.

8 Your Honor, in their objection the  
9 first lien holders make the argument that this is a

10 tactic by the debtor and by the committee, that it  
11 is an attempt to deprive them of funding for this  
12 litigation that they want to pursue.

13 THE COURT: Oh my goodness.

14 MR. STAMER: That's exactly our  
15 point, your Honor. This is a constituency that  
16 just got paid 650 million dollars. If they don't  
17 have enough money to fund the litigation, then we  
18 all have problems. From our perspective, your  
19 Honor, if we have an allowed claim, there will be  
20 value at the end of the case to satisfy them.

21 Forcing the debtors to fund this litigation gives  
22 them literally nothing to lose. They're playing  
23 with house money, if the company is required to  
24 fund their litigation, which we believe is  
25 meritless. And, your Honor, we believe there is

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2 ample cause to modify the cash collateral order as  
3 requested by the debtor.

4 Thank you, your Honor.

5 MR. RYAN: Good morning, your Honor.

6 THE COURT: Good morning.

7 MR. RYAN: Joseph Ryan of Brown

8 Rudnick on behalf of law debenture which is the  
9 first lien trustee in this case.

10 Your Honor, if I may, both this  
11 motion and the debtors' later request for a  
12 continuance or for an extension of time to answer,  
13 which the court will deal with later in today's  
14 hearing, are, in our view, inappropriate appeals to

15 the court to use the court as leverage in order to  
16 extract a better settlement from my client with  
17 respect to the make whole. That's really what's at  
18 work here. Because from a legal standpoint, the  
19 motion that is being made with respect to legal  
20 fees, and the motion that's being made with respect  
21 to adjournment, don't have sufficient bases for the  
22 court to grant them.

23 We're not writing on a clean slate.  
24 I listened very carefully to the arguments that  
25 were made about adequate protection, lack of claim,

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1 we are not writing a clean slate here, your Honor.  
2 What's being requested of this court, your Honor,  
3 is not at the beginning of the case what to do  
4 about adequate protection with respect to secured  
5 claims, what's being requested of this court today  
6 is to change the adequate protection order that  
7 this court entered at the outset of the case. Can  
8 the court do that? Yes, the court can, but the  
9 court's discretion is circumscribed by some  
10 principles articulated by the Second Circuit, like  
11 it had to be in the interest of justice, there  
12 can't have been detrimental reliance on the  
13 original terms of the order.

14 In this case, your Honor, as we  
15 point out in our papers, our client was induced to  
16 agree to the original version of the order in this  
17 case with respect to cash collateral. We had some  
18 objections, including the way the second lien

20 holders who were junior to us were being treated.  
21 We ultimately negotiated this order and we were  
22 satisfied with the final provisions of it; what we  
23 relied on.

24 Now, your Honor, let's look at the  
25 argument that's being made today by the debtor and

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1 creditors' committee with respect to changed  
2 circumstances. And let's start with the first  
3 argument that they make. No secured claim, Judge,  
4 therefore no entitlement to adequate protection.  
5 That's a change, your Honor. They said because at  
6 the outset of this case these first lien holders,  
7 they were owed a lot of money; they were owed  
8 principal, interest. We paid it off, they don't  
9 have any claim, therefore there is no entitlement  
10 to adequate protection; change in circumstances.  
11 Well, Judge, I'm afraid that fails to take into  
12 account a very important provision of the cash  
13 collateral order, which at least today, who knows  
14 what will happen tomorrow, but at least as of  
15 today, the debtor is not seeking the court to  
16 modify, namely paragraph 21.

17 Paragraph 21 of the cash collateral  
18 order, your Honor, basically says that secured  
19 claims are presumed -- this is the essence of the  
20 provision -- to be valid, unless, unless, Judge,  
21 the debtor or some other party files an action in  
22 this court by a certain date, namely July 30th.  
23 So, it's not -- you know, it isn't that the court

25 is to take for granted today, based on these

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2 gentleman's representations, that we have no claim.  
3 Quite the contrary, Judge, the court needs to take  
4 into account today the fact that we have a claim  
5 until they pursue the appropriate measures set out  
6 in the cash collateral order to challenge that  
7 claim by the deadline.

8 Now, Judge, I would like you to hold  
9 that thought about the deadline because that's  
10 going to be very relevant to the next motion that  
11 you're going to hear about a request for an  
12 indefinite extension for them to answer our  
13 complaint.

14 This cash collateral order is a  
15 fine, intricate web of provisions, some of which  
16 benefit our client, some of which benefit the  
17 debtor, but those provisions which benefit our  
18 client are ones that go to the notion that secured  
19 creditors in these cases, if they are going to go  
20 along with what the debtor wants at the outside,  
21 they want to have their claims adjudicated pursuant  
22 to a process within the time frame, and get it done  
23 promptly and quickly. So for the debtor now to  
24 say, hey, they don't have a claim therefore no  
25 adequate protection, I'm sorry, Judge, that's not

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2 what this order contemplates and it's not fair to  
3 change that.

4 Now they go on to say, well, you  
5 know what? Gee, if they have a claim, this make  
6 whole, which is a one hundred million dollars; I  
7 guess it's not much to them, it's quite a bit to  
8 our client. A hundred million dollars is only a  
9 hundred million dollars if it actually exists. You  
10 know what, there is an equity cushion. So, what  
11 the heck, don't continue to enforce the provisions  
12 of the order with respect to the payment of fees  
13 because there's an equity cushion. That's not a  
14 change of circumstances, your Honor. There's been  
15 an equity cushion in this case since the beginning.  
16 There was an equity cushion when we started this  
17 case, there's an equity cushion now --

18 THE COURT: So what all its coming  
19 down to is fees.

20 MR. RYAN: That's what this motion  
21 is about.

22 THE COURT: Well, that's --

23 MR. RYAN: Your Honor, I was  
24 perfectly happy with the order; that's what this  
25 motion is about, they want to change the deal. My

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2 client has rights here.

3 THE COURT: Paragraph 25 allows them  
4 to do that.

5 MR. RYAN: No, it doesn't, your  
6 Honor. Paragraph 25 allows them to, with all due

7 respect --  
8 THE COURT: I'll make the  
9 determination.  
10 MR. RYAN: I understand, Judge. I  
11 certainly didn't mean to suggest otherwise.  
12 The point is that all paragraph 25  
13 says is they have the right to come in here and  
14 make a request. It doesn't say that the court  
15 should grant it for --  
16 THE COURT: For --  
17 MR. RYAN: -- any reason or no  
18 reason. That's the point. What's the standard,  
19 Judge? It can't just be Willy Nilly, it can't  
20 because they ask for it they expect you to grant  
21 it, there's got to be a showing, at least that's  
22 what the Second Circuit has articulated as the  
23 standard.  
24 They go on to argue, your Honor, and  
25 this wasn't flushed out in oral argument, but

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2 something I certainly noticed in the papers, they  
3 say Judge --  
4 THE COURT: By the way, as a  
5 footnote you should know that I spent a lot of time  
6 going over all of your papers, every word.  
7 MR. RYAN: You have that reputation,  
8 I appreciate that.  
9 THE COURT: My wife doesn't, but  
10 that's okay.  
11 MR. RYAN: They say, Judge, there's

12 another practical problem, namely if you allow fees  
13 to be paid and the make whole is not due, then  
14 we'll have to recover those fees, because there's  
15 no entitlement to them unless the make whole is  
16 due. Well, that's not so, your Honor. It's just  
17 not so. Maybe that's why that argument was wasn't  
18 reiterated this morning orally, because the  
19 indenture provides very clearly for the payment of  
20 fees in connection with the enforcement of the  
21 indenture and claims made against the trustee by  
22 the company, in this case the debtor.  
23 The case law is clear that there is  
24 an entitlement to fees under 506(b) if the  
25 underlying agreement so provides and if there's

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2 over collateralization, as we all agree there is  
3 here, irrespective of whether the position on the  
4 merits that's being articulated by the secured  
5 creditor prevails or not, and we've sighted those  
6 cases. The standard of course is reasonableness,  
7 we're not afraid of that standard. Indeed, Judge,  
8 I think what the court should focus on here is that  
9 is the standard and that is the mechanism that is  
10 established in the order itself that they are  
11 seeking to modify for the disposition of fees.  
12 We are not looking to recover  
13 unreasonable fees, the order provides only that we  
14 are entitled to reasonable fees, and the order  
15 provides a very orderly mechanism to determine what  
16 is reasonable and unreasonable. The statements are



17 submitted. They are reviewed by the debtor. They  
18 are reviewed by the creditors' committee. They can  
19 object to those fees that they believe are  
20 unreasonable. We then have the opportunity to talk  
21 about it to see if we can resolve it, and if not  
22 those fees that are objected to come before this  
23 court for determination, this court being the final  
24 arbiter of the question.

25 I don't see why we need to change

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1 that mechanism, and the only reason that I can  
2 think of is that they are trying to beat us over  
3 the head. We are not going away; whether the court  
4 grants this motion or not we are not going away,  
5 but the question is are we going to be treated in a  
6 manner that is fair and consistent with the order  
7 or are we going to be treated in some other manner?  
8 There just isn't a reason to change what is in  
9 place because it contemplates a reasonable test.

11 And by the way, Judge, it does us no  
12 good to put ourselves in a position where we look  
13 like we are magnifying fees for the sake of fees.  
14 And indeed, our client, quite judiciously, has put  
15 the financial advisors previously retained into a  
16 no service period. Our activities have been  
17 confined, quite properly as they should be, to the  
18 make whole issue. And so, now going forward, if we  
19 submit statements and the debtor doesn't think that  
20 they are appropriate and we can't resolve it on the  
21 basis of reasonable people, then the court will

22 decide what's reasonable and what is isn't.  
23 Finally, your Honor, this business  
24 about nunc pro tunc is sort of the insult to the  
25 injury. There's no basis for the court to go back

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1 and change the rules of the game in hindsight.  
2 It's one thing of course for the court to say okay,  
3 look, here we are, I've heard what the parties have  
4 said, and, you know, going forward we are going to  
5 do it this way. But what they want is for you to  
6 go back and change the rules of the game  
7 retroactive to a date, interestingly enough, when  
8 they say they paid the full principle and interest.  
9 Well, of course they didn't, they acknowledge that  
10 that really wasn't the date they fully paid it,  
11 that was the date they almost fully paid it, but  
12 they would like the court to go back to it. Even  
13 the U.S. Constitution has a provision of ex post  
14 facto laws. It's fundamental fairness. I don't  
15 know that it rises to a constitutional question  
16 ultimately, but it's a level of fairness that the  
17 rules of the game not be changed retroactively.

19 So for all those reasons, your  
20 Honor, I would urge the court to leave in place the  
21 order as it stands. It certainly is sufficiently  
22 flexible to accommodate any concerns with respect  
23 to the proliferation of unreasonable fees, if that  
24 is indeed the concern, and I would urge the court  
25 to deny the motion.

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2 MR. CANTOR: Your Honor, if I may  
3 just briefly reply?  
4 Working backwards, with respect to  
5 the date that we asked the court to enter the order  
6 nunc pro tunc, I would say that the reason why  
7 there's some question as to whether or not it was  
8 paid by day or not paid by day. It was very  
9 difficult executing on your Honor's order  
10 authorizing us to pay the amounts due. As you  
11 know, we had to come back for a number of orders  
12 for things that appeared to be hyper technical, and  
13 I don't think it's unfair that we are authorized to  
14 go back to at least the day that we paid it down.  
15 When we commenced the case, we owed  
16 these first lien holders 650 some odd million  
17 dollars and they had asserted secured claims. And  
18 it was the very beginning of the case, we were  
19 trying to get the use of cash collateral. We  
20 necessarily had to negotiate agreements with our  
21 secured creditors that we thought were reasonable  
22 under the circumstances. And whether or not we  
23 could have litigated with the first secured lien  
24 holders, and, one, had proven that they were  
25 already adequately protected, we had considered

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2 that and determined that discretion was the better

3 part of valor, and go ahead and make a deal.  
4 For there to be a suggestion that  
5 things are not so different that it's appropriate  
6 to reconsider the adequate protection we committed,  
7 we paid the secured creditor back what they are  
8 owed. And I think that under any measure,  
9 reconsidering what we've committed to provide as  
10 adequate protection, is sort of -- it's hard to  
11 imagine that anybody could suggest that the  
12 circumstances aren't so changed that we should not  
13 be authorized to modify that obligation.

14 Likewise, the reliance, I could  
15 understand their reliance argument if we hadn't  
16 paid them anything back and we came back to court,  
17 we are not waiving our right to do that to other  
18 creditors by the way, but come back to court, not  
19 pay them a nickel, and ask you to modify the cash  
20 collateral order, that's a very different  
21 situation. That's not what we have here.

22 Your Honor, the issue of the date  
23 that we need to bring actions to challenge the  
24 secured claims of the first lien holders and other  
25 lien holders is likely something wrong that we are

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2 talking about, and it's our hope that if we and/or  
3 the committee have reached some conclusions, or at  
4 least preliminary conclusions, that there are  
5 issues that need to be investigated and considered,  
6 that the secured parties will likewise consider it  
7 to be the better part of valor to agree to an

8 extension of that date or we need to either file  
9 complaints that would unnecessarily inflame things  
10 in what has been what I think a pretty consensual  
11 case so far, a constructive case, and in all  
12 likelihood we'll be back before your Honor asking  
13 for an extension of time to challenge liens or  
14 secured claims, and I'm glad Mr. Ryan reminded us  
15 of that, because it's something I think that we all  
16 need to talk about, it certainly will have  
17 relevance in connection with the status conference  
18 that we are going to have on the adversary  
19 proceeding.

20 Which leads me to my last point,  
21 which is: In some respects, I don't think there is  
22 any question that an action has been filed in the  
23 court that brings into play and calls into question  
24 and joins before your Honor some issues about the  
25 allowance of that secured claim. And to suggest

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2 that a failure to bring an action by the debtor by  
3 the date -- I don't remember what the date was, it  
4 might have been July 30th or July --  
5 MR. STAMER: July 30th.  
6 MR. CANTOR: -- to suggest, and I  
7 guess as long as we're here we can get it all on  
8 the record, that I don't think there should be any  
9 question that the debtors challenged the secured  
10 claim of the first lien holders as it relates to  
11 the make whole with full reservation of rights on  
12 any other challenges, and I hope we don't need to

13 get into that question, particularly in connection  
14 with the status conference. And, your Honor, to  
15 the extent we can have the record reflect that and  
16 an understanding that our obligation under the  
17 catch collateral order is satisfied, at least as it  
18 relates to the challenge of the make whole, we  
19 don't think the make whole is an allowable claim,  
20 and I think the committee agrees with us. And to  
21 the extent that the first lien holders deserve  
22 notice and an opportunity to understand what the  
23 challenge is, we object to that claim, your Honor,  
24 and hopefully that will be able to resolve any  
25 other extensions related to challenging liens and

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2 other sphered claims later on.  
3 MR. STAMER: Your Honor, just  
4 briefly. We echo the sentiments by Mr. Cantor and  
5 have nothing further.

6 MR. RYAN: Your Honor, the point of  
7 my argument is that it isn't enough just to raise  
8 your hand and say, you know what, we don't think  
9 that you are owed the money. There is a procedure  
10 that is supposed to be followed, namely an  
11 articulation of the basis. And they just want to  
12 avoid that in order to continue to prolong this  
13 process. They are very coy in their pleading, your  
14 Honor. They are going to tell you what the details  
15 of their position are and tell us when the time is  
16 appropriate, in their view I guess, namely sometime  
17 in the indefinite future. That's not what this

18 order contemplates. That's not what this order  
19 provides. And that's not fair.  
20 THE COURT: Thank you all.  
21 As I told you, I've read the papers  
22 very carefully, and it isn't even really a weighing  
23 factor, if I were to weigh, certainly  
24 predominantly, the arguments of the creditors'  
25 committee and the debtors' clearly are correct and

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1 clearly justify the relief that's being sought  
2 here.  
3  
4 As has been conceded by Mr. Ryan and  
5 as articulated in all of the papers, if there is  
6 remaining an issue of adequate protection, there is  
7 an overwhelming amount of assets to support  
8 adequate protection. There is an enormous amount  
9 of equity here, and that's been conceded. So what  
10 are we fighting about? Well, we're fighting about  
11 when it comes to the professional fees, which have  
12 been provided for in the earlier cash collateral  
13 order with the caveat, with the right and  
14 reservations, that based upon changed circumstances  
15 there can be a modification. And that's why we're  
16 here today, there is a seeking of the appropriate  
17 modification.

18 Based upon other overwhelming fact,  
19 and we are just glossing over the normalcy, do I  
20 owe you anything more when I pay you 650 some odd  
21 million dollars? Well, the argument is no, I owe  
22 you nothing more, there's nothing more to be

23 adequately protected; however, there is the issue  
24 with respect to the make whole. That is like a  
25 dangling participle, it is not clear at all at this

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1 point whether the make whole is appropriate, needs  
2 adequate protection or not.  
3  
4 Certainly, what we're left with as a  
5 practical matter, is this estate funding the  
6 litigation against itself with respect to the make  
7 whole argument? That's a great incentive to  
8 continue to carry on the litigation. I'm not going  
9 to give a lot of credibility to the statements  
10 which are not backed up on page six and seven of  
11 the debtors' application where quotes are made with  
12 respect to threats to continue this litigation  
13 until it uses up maybe 10 million dollars in fees.  
14 I know that that's hyperbole, and I know that's  
15 part perhaps of a litigation tactic if indeed it  
16 has been asserted. But nevertheless, the mere fact  
17 that there is incentive to continue an engine of  
18 litigation, based upon the fact that the fees for  
19 the adversary in that litigation are coming out of  
20 the estate, I find to be improvident, improper, and  
21 certainly under the changed circumstances that  
22 exist today, call for a modification of the  
23 arrangement of paying for fees as adequate  
24 protection.

25 And as a footnote to that, I don't

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2 know where this form of adequate protection got  
3 some currency. When I grew up in the Bankruptcy  
4 Code, I cut my teeth in it, adequate protection  
5 almost never included having to pay the other  
6 side's attorneys fee. If they won they got paid,  
7 if they didn't win they didn't get paid. And  
8 that's what pertains here. If indeed, Mr. Ryan,  
9 you are successful in your quest and it turns out  
10 that you are contractually or otherwise entitled to  
11 attorneys' fees, there is sufficient here in the  
12 estate to cover for that. But it is highly  
13 improvident and improper, in my judgment, to  
14 continue paying and funding the litigation under  
15 these circumstances without my even getting into  
16 the issue of reasonableness, because it does seem  
17 that based upon the numbers that have been put  
18 before me, that these fees that are coming from the  
19 professionals for the note holders are escalating,  
20 and I don't think that that's a tolerable fact  
21 under any circumstances.

22 With respect to the 506 argument,  
23 I'm sure before this case is over I'm going to see  
24 lots of 506 requests for compensation, and at that  
25 time I'm sure I will hear from Mr. Ryan and his

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1 CALPINE CORPORATION  
2 cohorts in that connection, but this is not the  
3 time for that.  
4 With respect to the nunc pro tunc

5 portion, clearly you have been on notice, including  
6 an indication from the court at prior hearings with  
7 respect to concern about reasonableness, that the  
8 continued compensation would be objected to; and it  
9 has not been paid, so nobody is asking for  
10 disgorgement at this point. The appropriate date  
11 would be the date that there has been full payment  
12 of the 650 some odd million dollars to your  
13 clients.

14 Accordingly, the request for  
15 modification is granted. Submit an appropriate  
16 order.

17 MR. CANTOR: Thank you, your Honor.  
18 Your Honor, the order reflects the  
19 date of repayment.

20 MR. RYAN: Your Honor, I don't think  
21 the order, unless it's been changed, reflects the  
22 date of the payment. By repayment, I mean that it  
23 allows sufficient to cover what was principal and  
24 interest, if that's what they mean by repayment. I  
25 don't think May 26th is the date. My understanding

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1 CALPINE CORPORATION  
2 is that that date is June 4th.

3 MR. CANTOR: Your Honor, I'm sure we  
4 can figure out the appropriate date, whether it's  
5 the 26th or the 4th. I don't know what kind of  
6 fees could have been incurred between the 26th and  
7 the 4th.

8 THE COURT: Well, if you divide 400  
9 thousand by 30, what do you get?

10 MR. RYAN: I'm simply responding to  
11 the court's desire to get an order --  
12 THE COURT: Yes, I desire to give  
13 you an order that reflects the final payment date.  
14 MR. CANTOR: June 4th is acceptable,  
15 your Honor, to the debtor.  
16 THE COURT: Good. This record  
17 indicates that June 4th, although the order doesn't  
18 state that. It is so ordered.  
19 MR. CANTOR: Thank you, your Honor.  
20 THE COURT: I have approved the  
21 order.  
22 MR. CANTOR: Thank you, your Honor.  
23 The next matter on the agenda I  
24 believe is the pretrial conference, which again --  
25 MR. POWELL: It's a motion to extend

1 CALPINE CORPORATION  
2 time.  
3 MR. CANTOR: A motion for an  
4 extension of time is next?  
5 MR. POWELL: We settled that one.  
6 MR. CANTOR: Okay. I'm sorry, your  
7 Honor. Your Honor, the debtors' motion to extend  
8 time to answer, and Mr. Powell is going to take the  
9 lead on that motion.  
10 MR. POWELL: Good morning again,  
11 your Honor. Jeff Powell on behalf of the debtors.  
12 Your Honor, we filed a motion for  
13 extension of time to answer or otherwise plead to  
14 the first amended complaint. That issue, to coin a

15 phrase, is inextricably intertwined with the status  
16 conference. The firsts filed an amended complaint.  
17 Our answer was due yesterday. Last week we filed a  
18 motion for an extension of time to answer. We did  
19 not ask for an indefinite extension, as was  
20 suggested a minute ago, nor is our motion an  
21 injunction. We are not seeking to enjoin the  
22 firsts from bringing this adversarial proceeding,  
23 we are seeking an extension of time, a continuance,  
24 to litigate it.

25 We raised, in our motion, three

1 CALPINE CORPORATION  
2 grounds for an extension, your Honor. The first is  
3 that this case should be litigated at a more  
4 suitable stage of the proceedings. That argument  
5 was briefed a couple of different times. It was  
6 argued on May 10, I won't belabor it again today.

7 The second ground for extension,  
8 your Honor, is that this case should not be  
9 litigated until the resolution of the appellate  
10 process. After the court's ruling on May 10, the  
11 firsts appealed your Honor's ruling; that issue is  
12 going up to the district court. The issues  
13 identified by the firsts in their pleadings, the  
14 issues presented on appeal, are virtually identical  
15 to the relief they seek in their declaratory  
16 judgment. And we've laid out in our papers the  
17 relevant language from both the issue that was  
18 presented on appeal and the first amended  
19 complaint. The resolution of appeal, your Honor,

20 will clearly affect the nature of the litigation  
21 here.  
22 I don't think there's any way that  
23 the resolution of the appellate process cannot  
24 impact this adversarial complaint, and they we laid  
25 that out both in our opening papers and the

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1 exhibits attached to it. If the district court  
2 were to affirm your Honor, it is possible that  
3 there may be a ruling that no make whole premium is  
4 due. If the district court was to reverse your  
5 Honor and hold that there may be a simultaneous  
6 payment of the make whole premium at the time the  
7 principal is repaid, then any litigation with  
8 respect to this complaint would be wasted, would be  
9 inefficient, and would be completely unwound.

10 The third reason, your Honor, that  
11 we raised in our papers for an extension, simply  
12 put, we need more time to investigate the facts and  
13 to prepare an answer. But the bottom line is, your  
14 Honor, we think the time to answer should be put  
15 off to a much later stage in the case, either at  
16 the claims reconciliation process, the plan  
17 confirmation stage, or at a minimum, at a minimum,  
18 your Honor, after the appeal process has been  
19 resolved with respect to your Honor's May 10th  
20 ruling.

21 Thank you, your Honor.

22 MR. STAMER: Your Honor, just very  
23 briefly. Again, Michael Stamer from Akin Gump on

25 behalf of the committee.

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1 Your Honor, the committee supports  
2 the debtors' motion. In addition, by order dated  
3 May 30th of this year, the court authorized the  
4 committee to intervene as party defendants to this  
5 action. The committee agrees that allowing the  
6 litigation to go forward presents a number of  
7 issues. It presents a risk of overlapping  
8 litigation on same or similar issues with the  
9 potential of conflicting decisions by different  
10 courts. We also strongly believe that this  
11 litigation will be distracting, time consuming, and  
12 expensive. As, your Honor, I'm sure has realized,  
13 this is an extremely complicated company, and an  
14 even more complicated restructuring, and that the  
15 resources of the company and its professionals now  
16 and in the near future need to be focused on fixing  
17 the company and reorganizing and restructuring  
18 these assets.

19 In addition, your Honor, based upon  
20 the holding of your Honor with respect to adequate  
21 protection, the first lien holders are adequately  
22 protected. There are, as we have stated and as  
23 your Honor has held, they are overwhelmingly over  
24 secured. To the extent they have claims, which we

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1  
2 strongly believe they do not, there will be money,  
3 whenever this is litigated, to satisfy those  
4 claims. And it is for those reasons, your Honor,  
5 that we join the debtors and support the motion to  
6 extend the time to answer.

7 THE COURT: Mr. Ryan, you oppose I'm  
8 sure.

9 MR. RYAN: I actually do. Thank  
10 you.

11 Your Honor, let me take the last two  
12 arguments raised by my colleague on behalf of the  
13 debtor, because the first argument that he made was  
14 something that the court handled at the last  
15 hearing, denied their request at that point for  
16 this indefinite extension, so I think we're down to  
17 the second two issues.

18 THE COURT: I think the way all the  
19 papers put it, I didn't rule.

20 MR. RYAN: Well, let me put it this  
21 way, you didn't grant the relief requested.

22 With respect to the argument that  
23 somehow the court should now back off deciding the  
24 make whole question because there is an appeal of  
25 the court's decision from last month authorizing

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1 the debtor to go forward to pay principle and  
2 interest, is, I guess, first of all ironic, in what  
3 the debtor wanted the court to adopt as a view was  
4 that it could authorize the payment of principal

6 and interest, Step one, and step two, proceed to  
7 dispose of the make whole. We said the court  
8 should combine the two, we lost that one before  
9 this court. The debtor now, I guess, has taken a  
10 somewhat different view, but that's just sort of in  
11 the nature of irony, I guess.

12 What the court really needs to focus  
13 on, I think, is what is on appeal and what is the  
14 subject of the complaint, and are they, in fact,  
15 inextricably linked, as is somewhat suggested.

16 What's at issue on the appeal is the question about  
17 did this court have the power under 105 and 363 to  
18 order the payment of principal and interest over  
19 the objection of the first lien note holders  
20 without disposing of, or without deciding I should  
21 say, the question of whether a make whole is due.  
22 Our issue was that that is not something that the  
23 court -- the court can't, in effect, force a  
24 contested claims resolution on a party in the  
25 absence of the plan process. As I said, we lost

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1 that issue before this court. That's what's before  
2 the district judge.

3 The district judge isn't being asked  
4 to determine the make whole, the amount the make  
5 whole, or even whether the make whole is due with  
6 respect to the redemption that took place on June  
7 4th, that's what this court is being asked to  
8 determine in connection with the complaint; namely,  
9 did that redemption, within the meaning of the



11 indenture, trigger a make whole, and if so, what is  
12 the amount of the make whole. The district court  
13 doesn't have to decide that; it isn't going to  
14 decide that. So that's a separate issue. That's  
15 what's before this court under the amended  
16 complaint, and it's not in any way inextricably  
17 linked to what's going on with respect to the  
18 appeal.

19 Judge, the second argument that's  
20 being advanced today is, to me, incredible. I  
21 don't know how the debtor one month ago can come  
22 before this court and say to you, Judge, we've got  
23 a good idea, we're going to redeem the first lien  
24 notes, we are going to do it because we can save  
25 money. It's too expensive debt. And, Judge, we

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2 know that there's lurking in the background this  
3 make whole, and we knew that if it were in fact  
4 due, our argument about saving money would be out  
5 the window because the amount of make whole would  
6 overwhelm any saving that we could achieve over the  
7 next four or five years, but you know what, Judge?  
8 We are satisfied -- this is at least my  
9 understanding of what they were saying to you, your  
10 Honor, we're satisfied, says the debtor, that no  
11 make whole is due. We've exercised our business  
12 judgment. Presumably what that entails is some due  
13 diligence into the facts so that one can make an  
14 informed judgment about whether a make whole is  
15 due. That was the thrust of what was put before

16 the court last month. Presumably the court  
17 accepted that at face value and authorized the  
18 relief that was requested.  
19 Now, a month later, Judge, the  
20 facts, say the debtor, are so complicated that we  
21 need a lot more time to figure them out. That's  
22 pretty scary. I don't understand how, other than  
23 that in a cynical way, one can say those two  
24 things, one in June, one in July, and expect to  
25 have any credibility before this court. Unless the

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2 view is, look, the court's job is not to be an  
3 impartial arbiter of disputes between contesting  
4 parties, the court's job is to, you know, just do  
5 whatever the debtor asks the court to do in the  
6 interest of the debtors' convenience and the  
7 debtors' positions that they wish to advance,  
8 whether those positions are contradictory from one  
9 month to the next or not. I mean it just defies  
10 credibility, your Honor.

11 THE COURT: It doesn't to me, Mr.  
12 Ryan, because there's only one real issue here, and  
13 it's the word inextricable and whether the appeal  
14 and your complaint are inextricably tied together  
15 is what drives my determination.

16 MR. RYAN: Your Honor, please, if in  
17 any way I've suggested that the court --

18 THE COURT: So you are going beyond  
19 what the real issues are.

20 MR. RYAN: Fair enough, your Honor.

21 I'm just pointing out that I don't think that the  
22 debtor can credibly argue with respect to what they  
23 have argued.

24 THE COURT: Well, debtors and  
25 parties in interest are sometimes credible,

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2 sometimes incredible, and I've seen them all, and  
3 I've seen them all in this case by the way.

4 MR. RYAN: Your Honor, I would also  
5 say that we suggested that if they need a little  
6 more time that would be okay, we are not  
7 unreasonable people in that respect.

8 THE COURT: Well, you threw in the  
9 magic word in your papers that we are negotiating  
10 toward a settlement, and I've tried to parse that  
11 out. And while that's only a side issue here, it's  
12 not even an issue at all, I'm driven to inquire  
13 what settlement was under discussion. Is it the  
14 issue to make whole? Is it the issue of  
15 professional fees on the modification order?

16 It's not important that you tell me,  
17 but I was just wondering if there was a global  
18 settlement being discussed or specific settlements  
19 based upon specific tranches of litigation.

20 MR. RYAN: I'm not --

21 THE COURT: You are all --

22 MR. RYAN: -- I think I'm  
23 constrained, your Honor.

24 THE COURT: Nobody wants to respond,  
25 and I don't want you to respond, but I thought it

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2 was very interesting that you threw that into your  
3 papers as an argument, that we should then help  
4 with the standstill because there are settlement  
5 discussions going on.

6 MR. RYAN: No, your Honor. What --  
7 if I can --

8 THE COURT: If there are none,  
9 that's fine.

10 MR. CANTOR: Your Honor, if I may.  
11 I rise, and I don't mean to be impertinent to the  
12 question. It would be unfair to tell your Honor  
13 that there are any meaningful settlement  
14 discussions going on. And I would say that  
15 representations in that vein have widely incredible  
16 effects on the pricing of these bonds, and even  
17 discussing this here.

18 THE COURT: Well, that was contained  
19 in Mr. Ryan's papers.

20 MR. CANTOR: Yes. And that's why I  
21 would just want to put a fork in it now. It would  
22 be unfair to suggest that there are any meaningful  
23 discussions going on.

24 THE COURT: Very well.

25 MR. RYAN: Your Honor, what we were

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2 trying to say in the papers is that there was a

3 dialog about the length of time with respect to  
4 which the --

5 THE COURT: I think the word began  
6 with an S and ended with a T.

7 MR. RYAN: That's true, your Honor.  
8 What I'm trying to say, your Honor, is that we  
9 pointed out there were some discussions about how  
10 long the --

11 THE COURT: You need go no further,  
12 Mr. Ryan, because the caution has just been thrown  
13 out on the table. And I accept the yellow or the  
14 red light.

15 MR. RYAN: Fair enough, your Honor.  
16 I'm just pointing out that, you know, we are  
17 willing to entertain, and we've communicated that,  
18 some reasonable additional period in which an  
19 answer could be filed.

20 What doesn't seem appropriate is  
21 that that period become an indefinite period to  
22 some future claims resolution process. That's not  
23 consistent with the terms of the cash collateral  
24 order, as I pointed out, which requires or  
25 contemplates a prompt airing of these issues, to

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1 CALPINE CORPORATION  
2 the extent that there are disputes with respect to  
3 secured claims, including ours. It's not  
4 consistent with notions of fundamental fairness in  
5 which justice delayed without good reason is  
6 justice denied.

7 So what we would urge the court is

8 that if there is going to be some limited period in  
9 which they are given to formulate their answer,  
10 that it be tailored to their specific needs, and  
11 that it not simply be something where the court  
12 allows them an indefinite period to respond,  
13 thereby just putting the determination of my  
14 client's rights on ice for months or years without  
15 any underpinnings to that determination. In  
16 essence, your Honor, I'm just asking the court not  
17 to establish or to make a determination here that  
18 just amounts to lessen their desires to stall an  
19 adjudication of the make whole issue.

20 THE COURT: Does anyone else want to  
21 be heard?

22 MR. POWELL: No.

23 THE COURT: On April 19th 2006, the  
24 debtors filed a motion for an order authorizing the  
25 debtors to repay immediately up to 646.11 million

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1 CALPINE CORPORATION  
2 dollars of principal of their first lien debt and  
3 permit all parties in interest to reserve their  
4 rights to litigate the disputed make whole premium  
5 demand, if necessary, at a more suitable a stage of  
6 the Chapter 11 proceeding.

7 On May 5, the first lien trustee  
8 filed both an objection to the debtors' repayment  
9 motion, and a complaint seeking, inter alia, a  
10 declaratory judgment in favor of the first lien  
11 trustee declaring that the debtors were prohibited  
12 from making the proposed repayment without making a

13 simultaneous payment of the corresponding make  
14 whole premium due in connection therewith. The  
15 creditors' committee was subsequently authorized to  
16 intervene in the adversary proceeding.

17 Following a hearing on May 10, this  
18 court granted the debtors' motion to repay first  
19 lien debt principle (the May 10 order), but did not  
20 rule on the debtors' request to postpone litigation  
21 over the first lien trustee's make whole premium  
22 demand.

23 The first lien trustee appealed the  
24 May 10 order, as well as successive orders  
25 implementing the first lien debt principle

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2 repayment authorized by the May 10th order; we'll  
3 call that the repayment orders.

4 According to the first lien trustee,  
5 the issue to be presented on appeal are, and I'll  
6 either quote or paraphrase here: Whether the  
7 bankruptcy court erred and otherwise acted  
8 improperly, one, in concluding that it had  
9 authority under Sections 105 and 363(b) of the  
10 Bankruptcy Code or applicable law, to authorize the  
11 debtors to repay principal of first lien notes  
12 outside the context of a plan of reorganization  
13 without, and I emphasize, first determining whether  
14 such prepayment was permitted under the first lien  
15 indenture absent a simultaneous payment of any  
16 applicable premium due thereunder. End the  
17 emphasizing. And, two, otherwise directing such

18 repayment not in conformance with the terms and  
19 conditions of the first lien indenture. (See the  
20 notices of appeal.)

21 On June 6th, the first lien trustee  
22 filed its first amended complaint that, among other  
23 things, again seeks a declaratory judgment, "that  
24 the debtors are required to pay the make whole  
25 premium due under Section 3.05(b) of the first lien

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2 indenture, simultaneously in connection with the  
3 redemption of the first lien notes."

4 On June 16, the debtors filed a  
5 motion, which the creditors' committee joined, to  
6 extend their time to answer or otherwise plead to  
7 the first lien trustee's first amended complaint.  
8 Also on June 16, the first lien trustee filed a  
9 request to file a motion for summary judgment with  
10 respect to the issue of the make whole premium.

11 Clearly, as noted by the debtors and  
12 the committee. The issue that the first lien  
13 trustee seeks to litigate in its adversary  
14 proceeding is "inextricably intertwined" with its  
15 appeal of the repayment orders. This court  
16 concurs. The central issue in both the appeal and  
17 adversary proceeding is virtually identical: to  
18 wit, whether the payment of the first lien debt  
19 without payment of the make whole premium was  
20 permissible. The posture of the case at this point  
21 is that the same issue is before two courts which  
22 could render conflicting results. Because the

23 issue is now before the District Court in the  
24 appeal, it should not be considered by this court  
25 at this time.

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2 Additionally, as noted by the  
3 creditors' committee, if the first lien holders are  
4 successful in their appeal and the repayment of the  
5 first lien debt is consequently unwound, the issue  
6 of the make whole premium is moot unless the  
7 debtors again seek authority to repay the first  
8 lien debt.  
9 Accordingly, the debtors and the  
10 committee's request to extend their time to file an  
11 answer or otherwise move, is granted until ten days  
12 after the appeal is decided or resolved. Likewise,  
13 the first lien trustee's request to file a motion  
14 pursuant to Rule 7056-1A for summary judgment is  
15 denied without prejudice pending the outcome of the  
16 appeal.

17 It is so ordered.  
18 MR. CANTOR: Your Honor, in that  
19 connection I had the opportunity to pull out the  
20 cash collateral order where the debtors and the  
21 official committee, and any other persons in the  
22 case seeking to challenge secured claims have until  
23 July 30th of this year to bring that action. I  
24 would just like to stake out, if not an  
25 understanding an order of the court, that if we are

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2 necessarily going to wait until the appeal process  
3 has run its course as it relates to the motion to  
4 repay, that we likewise not be barred by the June  
5 30 deadline, so that if we don't file our answer.  
6 We've made it pretty clear, I know it hasn't been  
7 accepted, that we intend to object to the claim and  
8 either seeking an agreement in that connection an  
9 order of your Honor that this date, as it relates  
10 to challenging the make whole claim, likewise be  
11 extended.

12 MR. RYAN: We wouldn't agree with  
13 that, your Honor. We don't think it's that's  
14 appropriate.

15 THE COURT: Well then make your  
16 challenge, Mr. Cantor.

17 MR. CANTOR: We will bring the  
18 appropriate motion, your Honor.

19 THE COURT: Okay.

20 MR. POWELL: Your Honor, may I ask  
21 you a question about your ruling on the motion for  
22 an extension of time? I don't want to gild the  
23 lily, but I know that in April and May there were  
24 discussions between the debtors and the firsts  
25 where the prospect of appealing beyond the District

1 CALPINE CORPORATION  
2 Court was raised. Your order refers to an answer  
3 within ten days after the resolution of the appeal

4 we expect to win, we don't know what the intentions  
5 of the firsts would be. And I'm just trying to  
6 think that through, and perhaps maybe we can come  
7 back to your Honor within a certain amount of days  
8 after the District Court rules and get a sense  
9 where the losing party is?

10 THE COURT: Well, you can certainly  
11 come back to the court. You can also deal with the  
12 District Court, and if it has to go further both  
13 sides can seek stays pending the appeal and the  
14 like.

15 MR. POWELL: Okay.

16 THE COURT: I've so ordered this  
17 record. Unless you want to push a paper order,  
18 gentlemen. I don't think it's necessary.

19 MR. POWELL: Nor do I.

20 MR. CANTOR: Thank you, your Honor.

21 MR. STAMER: Your Honor, I'm sorry

22 maybe I misunderstood. Our understanding, my  
23 understanding of your order was the resolution of  
24 appeal by final non appealable order, so if we  
25 prevail in the District Court and they don't appeal

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2 once the time to appeal lapses --

3 THE COURT: The ruling says that ten  
4 days after the appeal is decided or resolved in a  
5 final non appealable order. Is that your  
6 recommendation?

7 MR. STAMER: I believe it is, your  
8 Honor. That way we don't have to come back

9 in-between the two appeals, so that if it goes  
10 further we all understand that the deadline is  
11 extended.

12 THE COURT: I'm going to grant that  
13 application.

14 MR. STAMER: Thank you, your Honor.

15 MR. RYAN: Note by my objection.

16 THE COURT: Certainly.

17 MR. POWELL: I think in light of  
18 your Honor's ruling, that's taken care of the  
19 pretrial conference with respect to the adversary.

20 THE COURT: Yes, it has, and it's  
21 also taken care of the application to bring on a  
22 motion for summary judgment as well.

23 MR. STAMER: Thank you, your Honor.

24 THE COURT: Thank you all.

25 MR. CANTOR: Your Honor, before we

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2 all -- there are two last matters which were  
3 adjourned. I just wanted to note for the record  
4 that there is a motion to compel performance under  
5 certain power purchase agreements between Calpine  
6 and Acadia, and the second motion is for payment of  
7 administrative expenses for Salwson Exploration  
8 Company. Both of those have been, by agreement,  
9 adjourned to July 26th, which is the second hearing  
10 date we have in July, your Honor.

11 THE COURT: All right.

12 MR. CANTOR: Thank you, your Honor.

13 THE COURT: Thank you all.

MR. STAMER: Thank you, your Honor.

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IN WITNESS WHEREOF, I have  
hereunto set my hand this \_\_\_\_\_ day of  
\_\_\_\_\_, 2006.

DENISE NOWAK

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C E R T I F I C A T E

STATE OF NEW YORK        )  
COUNTY OF WESTCHESTER } ss.:

I, Denise Nowak, a Shorthand  
Reporter and Notary Public within and for  
the State of New York, do hereby certify:  
That I reported the proceedings in  
the within entitled matter, and that the  
within transcript is a true record of such  
proceedings.

I further certify that I am not  
related, by blood or marriage, to any of  
the parties in this matter and that I am  
in no way interested in the outcome of  
this matter.

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